

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
NECLEC, LLC
OCN# 4580
File No. EB-01-IH-0017j
NAL/Acct. No. 200132080041
FRN 0005-0234-78

MEMORANDUM OPINION AND ORDER

Adopted: May 8, 2002

Released: May 10, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we deny NECLEC, LLC's ("NECLEC") request for cancellation and refund of its payment of a \$6,000 forfeiture proposed in our Notice of Apparent Liability for Forfeiture ("NAL").

II. BACKGROUND

2. On April 24, 2001, the Chief, Enforcement Bureau, acting pursuant to delegated authority, issued the NAL to NECLEC, proposing a \$6,000 forfeiture. We issued the NAL because it appeared that NECLEC had failed to report on its actual and forecast number usage by filing FCC Form 502, the North American Numbering Plan Numbering Resource Utilization/Forecast ("NRUF") Report that was due on September 15, 2000.

1 See NECLEC, LLC, 16 FCC Rcd 8630 (EB 2001).

2 The NRUF reports are due on or before February 1 and on or before August 1 of each year. See 47 C.F.R. § 52.15(f)(6). However, we note that the deadline for filing reports due August 1, 2000 was extended to September 15, 2000. Numbering Resource Optimization, CC Docket No. 99-200, 15 FCC Rcd 17005 (2000).

3 See 47 C.F.R. § 52.15(f)(3)(ii).

an NRUF report for one OCN, which was referenced in our *NAL*. We therefore determined that NECLEC had apparently violated section 52.15(f) of the Commission's rules, which requires U.S. carriers receiving numbering resources from the North American Numbering Plan Administrator ("NANPA"), a Pooling Administrator, or another telecommunications carrier, to report semiannually on their actual and forecast number usage.⁴

3. NECLEC initially responded to the *NAL* on May 24, 2001, and stated that it had submitted payment of the \$6,000 forfeiture proposed in the *NAL*. However, NECLEC supplemented its response on June 1, 2001, and reported that it had located evidence to demonstrate that it had indeed timely filed the September 15, 2000 NRUF report. Based upon this supplemental information, NECLEC requested cancellation of the forfeiture and refund of its payment of the \$6,000 forfeiture penalty.

III. DISCUSSION

4. A forfeiture penalty that is paid voluntarily is not recoverable absent a showing of fraud, duress, or mistake of fact.⁵ Pursuant to section 504 of the Act, the subject of an *NAL* need not pay a forfeiture until the United States seeks recovery and a final judgment is entered by a district court after a trial *de novo*.⁶ Moreover, the Act expressly prohibits the Commission from taking prejudicial action based on a forfeiture unless the forfeiture has been paid or a final court order requires payment of the forfeiture.⁷ Therefore, NECLEC did not have to pay the forfeiture until a district court ruled on the matter after a trial *de novo*, and as a matter of law, could not have been penalized for doing so.⁸ NECLEC's payment of the forfeiture, thus, was voluntary.

5. However, NECLEC states that after the paying the forfeiture penalty, it discovered evidence that it believed would demonstrate filing of the September 15, 2000 report. Under these circumstances, we will consider whether NECLEC's payment was based on a mistake of fact. We have reviewed the documentation that NECLEC submitted with its supplement, and find that it is insufficient to demonstrate compliance with the filing requirements. In this regard, carriers generally are required to report number utilization and forecast data electronically.⁹ According to the instructions for electronic

⁴ *Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 99-200, 15 FCC Rcd 7574 (2000) ("*NRO Order*"); *recon. and clarification in part*, Second Report and Order, Order on Reconsideration in CC Docket 96-98 and CC Docket 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket 99-200, 16 FCC Rcd 306 (2000) ("*NRO Recon. Order*").

⁵ *Associated Broadcasters, Inc.*, 12 FCC Rcd 3324 (1997); *C.R. Communications, Inc.*, 15 FCC Rcd 19114 (EB 2000).

⁶ 47 U.S.C. § 504(a).

⁷ 47 U.S.C. § 504(c).

⁸ *See Pleasant Broadcasting v. FCC*, 564 F.2d 496, 498 (D.C. Cir. 1977) ("forfeitures imposed by the Commission are recoverable, absent voluntary payment, only in civil proceedings brought by the United States Attorneys in the district court.").

⁹ 47 C.F.R. § 52.15(f)(3)(iii). *See NRO Order*, 15 FCC Rcd at 7598.

filing of the NRUF report due September 15, 2000, carriers were required to transmit their reports as an e-mail attachment. NECLEC did not follow this procedure for filing its NRUF report.¹⁰ NeuStar, the designated NANPA, has confirmed that the procedure that NECLEC attempted to use to submit its NRUF report would have prompted an error message, indicating that electronic transmission of the report was not completed. NeuStar installed this error message on the first day that NRUF reports could be electronically completed and transmitted, and there is nothing in NECLEC's showing to indicate that it attempted to file the report before this error message was in place. Because NECLEC failed to follow the electronic filing procedures, NANPA did not receive its NRUF report. Under these circumstances, we believe that NECLEC has failed to demonstrate a mistake of fact. NECLEC has not presented any evidence to suggest that its payment of the forfeiture penalty was based on fraud or duress. Accordingly, NECLEC is not entitled to a refund.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED THAT NECLEC LLC's request for cancellation and refund of its payment of the \$6,000 forfeiture proposed in our *Notice of Apparent Liability, NECLEC, LLC*, 16 FCC Rcd 8630 (EB 2001) IS HEREBY DENIED.

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent by Certified Mail/Return Receipt Requested, to Rachel Allen, Director of Legal/Regulatory, NECLEC, LLC, 190 Old Derby Street, Suite 101, Hingham, Massachusetts, 02043 and to its counsel, Cameron F. Kerry, Esq., and Lisa N. Anderson, Esq., Mintz Levin Cohn Ferris Glovsky and Popeo PC, 701 Pennsylvania Ave, N.W., Washington, DC 20004.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁰ See Supplemental Response, Exhibit B.